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(1)

06-1186

In The

Supreme Court of the United States

ANTHONY RHODES,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sexual Abuse and Sodomy statutes in the Code of Alabama, which by their express terms require a finding that the accused acted by forcible compulsion, violate due process as applied because the courts of the State of Alabama do not actually require a showing of forcible compulsion in order to convict under the statutes?

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PETITION FOR A WRIT OF CERTIORARI

Anthony Rhodes respectfully petitions for a writ of certiorari to review the judgment of the Court of Criminal Appeals of Alabama in this case.

OPINIONS BELOW

The decision of the Alabama Court of Criminal Appeals, No. CR-03-0294, affirming Rhodes' sentences is an unpublished memorandum opinion and is contained in the Appendix at App. 1-5.

BASIS FOR JURISDICTION

The decision of the Alabama Court of Criminal Appeals affirming Rhodes' convictions was issued on June 18, 2004. An application for rehearing was denied on July 23, 2004. Appendix at App. 6. The Supreme Court of Alabama denied a petition for certiorari on September 17, 2004. Appendix at App. 8. The Alabama Court of Criminal Appeals issued a certificate of judgment on September 20, 2004. Appendix at App. 7. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions are involved in this case:

The Sixth Amendment which provides a defendant the right to be informed of the charges against him:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI. The following portion of the Fourteenth Amendment is also implicated:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1, cl. 2-4. The following statutory provisions are involved in this case as well:

> Code of Alabama Section 13A-6-63(a) provides:
>
> A person commits the crime of sodomy in the first degree if: (1) He engages in deviate sexual intercourse with another person by forcible compulsion.

Ala. Code § 13A-6-63(a). Code of Alabama Section 13A-6-66(a) provides:

> A person commits the crime of sexual abuse in the first degree if: (1) He subjects another person to sexual contact by forcible compulsion.

Ala. Code § 13A-6-66(a). Code of Alabama Section 13A-6-60(8) defines forcible compulsion:

> FORCIBLE COMPULSION. Physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person.

Ala. Code § 13A-6-60(8). Code of Alabama Section 13A-1-2(14) defines serious physical injury as:

> SERIOUS PHYSICAL INJURY. Physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ.

Ala. Code. § 13A-1-2(14).

STATEMENT OF THE CASE

The March Term of the Grand Jury of Pike County, Alabama charged that "ANTHONY RHODES, whose name is to the Grand Jury otherwise unknown, did subject another person, to-wit: [B.A.], to sexual contact by forcible compulsion, in violation of Section 13A-6-66 of the Code of Alabama," and it also charged that "ANTHONY RHODES, whose name is to the Grand Jury otherwise unknown, did

engage in deviate sexual intercourse with another person, to-wit: [B.A.] by forcible compulsion, in violation of Section 13A-6-63 of the Code of Alabama." (C. 46.) Rhodes pled not guilty. (C. 17.)

At trial, the alleged victim's mother testified that she had lived with Rhodes during 2000 and 2001, and her daughter, the alleged victim, had lived with them during that time. (R. 38-39.) The alleged victim testified that Rhodes had felt on the outside of her clothes around her vagina and that "[h]e made me suck his thing." (R. 75-76.) The alleged victim also testified as follows:

Q. Why didn't you tell anybody?

A. I was scared of him.

Q. Now, you eventually told Ms. Carter. When you told her, where were you living?

A. With my daddy.

Q. Excuse me?

A. With my daddy.

Q. Why didn't you tell anybody before then?

A. I was scared of Mr. Rhodes.

Q. Why were you afraid of him?

A. I seen him beat Mama, and I was just afraid of him.

Q. You seen him do what?

A. Hit my mama.

Q. Speak up now so they can hear you.

A. I seen him hit my mama.

Q. Had he ever hit you?

A. For every "F" I got.

Q. Did he ever hit you for any other reason?

A. For yelling at my mama – for yelling at my mother.

Q. Did he ever hit you for any other reason?

A. No, ma'am.

Q. Did he ever make you do this on any other occasion?

A. Not that I can recall.

Q. Did he ever touch you on any other occasion?

A. (Witness shakes head.)

(R. 78-79.) On redirect examination by the prosecutor, the alleged victim also testified as follows:

Q. Who put their penis in your mouth?

A. Mr. Rhodes.

Q. Did you ask him to do it?

A. No, ma'am.

Q. Did he force you to do it?

A. Not really.

Q. Did you want him to do it?

A. No, ma'am.

Q. How old were you?

A. Twelve.

Q. How old were you when he touched you?

A. Twelve.

(R. 90.) The State then rested its case. (R. 91.) The Petitioner made a motion for judgment of acquittal on both counts, stating

> . . . there's been no proof of any sexual contact by forcible compulsion as alleged in the indictment in this case. The evidence is completely devoid of any force.
>
> As to Offense Two, as alleged in the indictment, we make the same motion. In that there has been absolutely no testimony or otherwise of any forceful compulsion perpetrated or engaged or done in this case that this defendant engaged in deviant sexual intercourse forcibly with [B.A.].

(R. 92.) Implicit within the motion for judgment of acquittal is the supposition that due process requires that the State be bound by its own statutes. Since due process is a constitutional right, it was at this point in the trial that Rhodes raised an issue cognizable in this Court.

Rhodes testified in his own defense and denied both of the allegations in the indictment. (R. 107-109.) The alleged victim then retook the stand in rebuttal and testified as follows:

Q. What did you have to do?

A. Suck his private.

Q. And how did you do that? What did he do to you when you were doing that?

A. He wasn't doing nothing.

Q. Did he do anything?

A. No, he did not.

Q. Did he do anything to your head –

A. No, ma'am.

Q. – with his hand?

A. No, ma'am.

Q. Where was your mouth?

A. On his private.

Q. On his what?

A. Private.

Q. What did he do with any part of his body when your mouth was on his private?

A. Nothing that night.

Q. Did you do that because you wanted to?

A. No, ma'am.

MR. LINDSEY: Objection.

THE COURT: Overruled.

MR. LINDSEY: We except.

MS. HARRISON:

Q. Did you want to do that?

A. No, ma'am.

Q. Well, why did you do that?

A. I was afraid of him.

Q. Why were you afraid of him?

A. I seen him hit Mama before.

(R. 127-128.) There was no further testimony in the case. Rhodes again moved for judgment of acquittal on both charges because there was no evidence of forcible compulsion, but the trial court denied the motions. (R. 129-130.) The jury returned guilty verdicts on both counts. (R. 150-151.)

Rhodes was sentenced to seven years and fifteen years respectively on the two convictions. After sentencing, the State asked for a very high appeal bond, but the trial court stated:

> He's shown up for all hearings. And all that would be evidence before this Court. The charges were forcible compulsion. I don't think you would need the trial attorney to – but it wasn't the sort of – I mean, the forcible part came in because you're talking about a child who was 12 years old and a full adult male.
>
> We're not talking about a situation where the guy is hiding in the bushes and knocks somebody in the head and drags them.
>
> I'm not trying to minimize at all what this man has been found guilty of doing, but it's not [a] classic forcible compulsion type situation.

(R. 172.) Rhodes then gave notice of appeal. (R. 173.) The Court of Criminal Appeals of Alabama affirmed the conviction by a memorandum opinion, finding sufficient evidence that there was forcible compulsion by inferring an implied threat because Rhodes was in a relationship of trust with the alleged victim. App. 1-5. An application for rehearing was denied, and the Supreme Court of Alabama denied a petition for certiorari. Rhodes now asks the Supreme Court of the United States to consider this matter.

ARGUMENT

The Sixth Amendment to the Constitution of the United States guarantees a criminal defendant the right "to be informed of the nature and cause of the accusation." U.S. Const. amend. VI. However, giving notice of the nature of an accusation is worthless and the due process accorded by the Fourteenth Amendment is meaningless if courts do not require the stated nature of the accusation to be proven. Both counts of the indictment in this matter charged Anthony Rhodes with acting "by forcible compulsion." There was no evidence whatsoever at trial that could support a finding of forcible compulsion. Nevertheless, the trial court allowed the case to go to the jury which found Rhodes guilty, and the Alabama Court of Criminal Appeals affirmed the conviction.

On its face, the indictment in this matter appeared to comply with the Sixth Amendment's requirement that a defendant must "be informed of the nature and cause of the accusation" when it stated in each charge that the proscribed act was accomplished "by forcible compulsion."

The Code of Alabama defines forcible compulsion as "physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person." Ala. Code § 13A-6-60(8). The testimony in this case ruled out any physical force or expressed threat, so the State had to rely on an implied threat. However, such an implied threat would have had to place the alleged victim in fear of immediate death or serious physical injury. Her only testimony was that she was scared of Rhodes because she had seen him hit her mother and he had also struck her when she had received bad grades or had yelled at her mother. Certainly, there was no fear of immediate death. The Code of Alabama also defines serious physical injury as "physical injury which creates a substantial risk of death, or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of any bodily organ." The alleged violence in the testimony did not reach the level of serious physical injury, and no fair inference from the facts could have implied a threat of serious physical injury.

Thus, although the Code of Alabama appears to be quite clear about the elements of the crimes of Sexual Abuse and Sodomy, there is a vagueness in the application of these statutes. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited." *United States v. Cardiff*, 344 U.S. 174, 176 (1952). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of

law." *Connally v. General Const. Co.*, 269 U.S. 385, 392 (1926).

In fact, the courts of the State of Alabama have been tending toward a vague interpretation of forcible compulsion for some time now. In *Powe v. State*, 597 So. 2d 721, 728 (Ala. 1991), the Supreme Court of Alabama held that a jury could reasonably find that a natural parent "held a position of authority and domination . . . sufficient to allow the inference of an implied threat." However, this holding "is limited to cases concerning the sexual assault of children by adults with whom the children are in a relationship of trust." *Id.* The State's evidence merely showed that Rhodes lived with the alleged victim's mother; there was no evidence that he was in a relationship of trust with the alleged victim. Moreover, even if one were to concede for the purposes of argument that an implied threat can more easily be inferred from a person in a relationship of trust, the State must still meet the burden of showing that the implied threat induced in the alleged victim a fear of immediate death or the substantial risk of death or of serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of a bodily organ. On this point, the State's evidence failed miserably, and the courts' reticence to impose upon the prosecution the burden of proving what the statute requires violated Rhodes' rights.

Because there was no evidence of forcible compulsion, Rhodes was denied due process when his motions for judgment of acquittal were denied. "Just as 'Conviction upon a charge not made ~~would be~~ sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Thompson v. Louisville*, 362 U.S. 199, 206 (1960). Any reading of the

statute that vitiates the required showing of forcible compulsion is unconstitutionally vague and cannot be countenanced.

CONCLUSION

Code of Alabama Sections 13A-6-66 and 13A-6-63 are void for vagueness as applied by the courts of the State of Alabama. Rhodes due process rights were thereby violated. The petition for a writ of certiorari should be granted in order to address this injustice.

Respectfully submitted,

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(Released Jun. 18, 2004)

MEMORANDUM

CR-03-0294 Pike Circuit Court CC-02-159 & -160

Anthony Rhodes v State

McMILLAN, Presiding Judge.

The appellant, Anthony Rhodes, was found guilty of sexual abuse in the first degree and sodomy in the first degree. The trial court sentenced him to 7 years' imprisonment for the sexual abuse conviction and 15 years' imprisonment for the sodomy conviction and ordered the sentences to run concurrently. The State's evidence tended to show that during most of 2001, 12-year-old B.A. and her mother were living with the mother's boyfriend, Anthony Rhodes, at his home in Pike County. B.A. was home schooled at that time. B.A. testified that in September of 2001, Rhodes entered her bedroom to help with her computer and began feeling her on top of her clothing in the area of her "vagina." She said that her mother entered the room and saw what Rhodes was doing. B. A. said that on

another occasion that year, Rhodes had made her suck his "private," which caused white "sperm" to come out. She said that the second act occurred the night before her church youth group went to Vision Land. The church's youth minister identified the date of the trip as August 4, 2001. B.A. said that she did not tell anyone about the abuse at the time it occurred because she was scared of Rhodes. She said that she had seen him hit her mother and that he had also hit her on several occasions. In November, 2001, after a custody dispute, B.A. began living with her father and attending Pike County Elementary School. On November 20 of 2001, she told the school principal that she had been sexually abused by "Mr. Rhodes," her mother's boyfriend. B.A.'s mother admitted that she had witnessed the incident in September. She said that she saw Rhodes with his hands between B.A.'s legs, fondling and rubbing the child's "privates." The appellant testified in his own behalf that he had not fondled B.A.'s private parts or asked her to suck his penis.

The appellant contends that the State's evidence was insufficient to support his conviction because the State failed to produce sufficient evidence of "forcible compulsion," as required by §§ 13A-6-66 and -63, Ala. Code 1975. He argues that the victim testified that he never threatened her or gave her any inducement to perform the alleged acts; that there were no apparent, constructive or implied threats that might have served to motivate her; and that the record is silent as to any evidence of acquiescence obtained by duress or fear of personal violence. He further argues that the record is silent as to any relationship of trust between him and the victim or any exercise of authority and control over her.

In order to prove the crimes of sexual abuse in the first degree and sodomy in the first degree, the State was required to show that the appellant subjected B.A. to sexual contact and engaged in deviate sexual intercourse with her by "forcible compulsion."[1] Forcible compulsion includes "a threat, express or implied, that places a person in fear of immediate . . . serious physical injury to himself or another person." § 13A-6-60(8), Ala. Code 1975. When sex crimes involve children, the force required to consummate the acts differs from the force required to consummate such acts against a mature female. *Powe v. State*, 597 So. 2d 721 (Ala. 1991). Questions involving resistance and force must be viewed in the context of the age and point of view of the assaulted minor. *Lee v. State*, 586 So. 2d 264 (Ala. Crim. App. 1991). The degree of force necessary for conviction is sufficient if the victim was under such duress that the act was accomplished without the victim's consent. *Long v. State*, 370 So. 2d 354 (Ala. Crim. App. 1979).

In *Parks v. State*, 587 So. 2d 1015 (Ala. Crim. App. 1991), this court found sufficient evidence of forcible compulsion when the defendant threatened to hurt the 17-year-old victim's mother when the mother returned, and the victim was aware of his previous acts of abuse. This Court found sufficient evidence of forcible compulsion when the defendant subjected a child victim to an implied threat of violence, *Parks v. State*, 565 So. 2d 1265 (Ala. Crim. App.1990) (implied threat to beat victim with belt), and threatened a child victim with discipline. *Rhodes v.*

---

[1] Proof of forcible compulsion was required because the victim was not less than 12 years old. See §§ 13A-6-66(a)(1) and (3) and -63(a)(1) and (3), Ala. Code 1975.

State, 651 So. 2d 1122 (Ala. Crim. App. 1994) (threat to deny victim food). In *Powe v. State*, supra, the Alabama Supreme Court held that an implied threat may be inferred when an adult in a position of authority is accused of sexually assaulting a child. The Court stated:

> " . . . [W]e note that our holding in this case is limited to cases concerning the sexual assault of children with whom the children are in a relationship of trust. The reason for the distinction between cases involving children as victims and those involving adults as victims is the great influence and control that an adult who plays a dominant role in a child's life may exert over the child. When a defendant who plays an authoritative role in a child's world instructs the child to submit to certain acts, an implied threat of some sort of disciplinary action accompanies the instruction. If the victim is young, inexperienced and perhaps ignorant of the 'wrongness' of the conduct, the child may submit to the acts because the child assumes that the conduct is acceptable or because the child does not have the capacity to refuse. Moreover, fear of the parent resulting from love or respect may play a role as great as or greater than that played by fear of threats of serious bodily harm in coercing a child to submit to a sexual act."

597 So. 2d at 728-29.

The victim in the present case was 12 years old. The appellant said that he had "tried to be a daddy" to her and provided her with a home, clothing, and food. He and the victim clearly were in a "relationship of trust," and the evidence of his "authoritative role" in her life was undisputed. The appellant did not deny committing acts of

violence against the victim's mother or hitting the victim as discipline for yelling and getting bad grades. The State's evidence was sufficient to show that B.A. faced an implied threat of violence to her mother, violence to herself, or disciplinary action if she resisted the appellant's abuse.

AFFIRMED.

Cobb, Baschab, Shaw, and Wise, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Lane W. Mann
Clerk
Sonja McKnight
Assistant Clerk

[LOGO]

July 23, 2004

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CR-03-0294
Anthony Rhodes v. State of Alabama (Appeal from Pike Circuit Court: CC02-159; CC02-160).

NOTICE

You are hereby notified that on July 23, 2004 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. Brenda M. Peacock, Circuit Clerk
J. E. Sawyer, Jr., Attorney
Nancy M. Kirby, Dep. Atty. Gen.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

CR-03-0294
Anthony Rhodes v. State of Alabama (Appeal from Pike Circuit Court: CC02-159; CC02-160).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Court of Criminal Appeals; and

WHEREAS, the judgment indicated below was entered in this cause on June 18th 2004:

Affirmed by Memorandum.

NOW, THEREFORE, pursuant to Rule 41 of the Alabama Rules of appellate Procedure, it is hereby certified that the aforesaid judgment is final.

Witness. Lane W. Mann, Clerk
Court of Criminal Appeals, on this
the 20th day of September, 2004.

/s/ Lane W. Mann
Clerk
Court of Criminal Appeals
State of Alabama

cc: Hon. Thomas E. Head, III, Circuit Judge
Hon. Brenda M. Peacock, Circuit Clerk
J. E. Sawyer, Jr., Attorney
Nancy M. Kirby, Dep. Atty. Gen.

IN THE SUPREME COURT OF ALABAMA

[LOGO]

September 17, 2004

1031716

Ex parte Anthony Rhodes. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Anthony Rhodes v. State of Alabama) (Pike Circuit Court: CC02-159; CC02-160; Criminal Appeals: CR-03-0294).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied – No Opinion

WOODALL, J., – Nabers, C.J., and Houston, Lyons, and Johnstone, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this *17th* **day of** *September, 2004*

/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama